
# Report of the Bureau of Insurance

to

the Joint Standing Committee on Insurance and Financial Services

on

Uninsured Motorist Coverage and *Butterfield v. Norfolk and Dedham Mutual Insurance Co.*

November 1, 2005

John Elias Baldacci
Governor

Christine A. Bruenn
Commissioner

Alessandro A. Iuppa
Superintendent

## Purpose of Report

As requested by the Joint Standing Committee on Insurance and Financial Services (the "Committee") in Resolve 2005, Chapter 100 (LD 122), the Bureau of Insurance (the "Bureau") consulted with interested persons and studied the legal and policy issues regarding uninsured motorist ("UM"[1]) coverage following the Supreme Judicial Court's opinion in *Butterfield v. Norfolk and Dedham Mut. Fire Ins. Co.* ("*Butterfield*").[2] This report details the process and results of this project.

## Background

The 122nd Legislature considered two bills related to the *Butterfield* decision in its First Special Session. LD 122 proposed amending the UM statute[3] by adding the "sustained by an insured person" limiting language that the Law Court had rejected in *Butterfield*. This approach would have made UM coverage consistent with a policy's primary coverage by requiring an insured person to have suffered a loss caused by an uninsured motorist. LD 541 proposed amending section 2902(1) by allowing an insurer to limit UM coverage to insured persons as defined in its policy. The Committee voted both bills Ought Not to Pass but reconsidered its vote on LD 122 and heard more testimony on the UM issue.

After considering this issue further, the Committee voted to support a resolve directing the Bureau to consult with interested persons and study the legal and policy issues regarding UM coverage. At a minimum, the Resolve directed the Bureau to study:

- current law regarding UM coverage,
- the decision in *Butterfield*, and
- related activity in the motor vehicle insurance market since *Butterfield*.

The Resolve also directed the Bureau to include recommendations and any suggested legislation in its report and to submit the report of its study to the Committee by December 5, 2005.

## Process: Convening Interested Parties

The Bureau convened meetings of persons expressing an interest in the issues surrounding *Butterfield* and UM coverage in Maine on July 18, 2005 and September 12, 2005. The Bureau invited a subgroup of Committee members and considered anyone an interested party who had testified at the Committee's hearings on LDs 122 and 541. Organizations and persons participating in the study included:

- Admitted Insurers: Acadia Insurance Company, MMG Insurance Company,

[1] Underinsured motorist (UIM) coverage, in which primary liability insurance is not enough to pay damages, is also part of UM coverage. The Bureau uses the term UM to apply to both coverages.
[2] 2004 ME 124
[3] 24-A M.R.S.A. § 2902(1).

Progressive Casualty Insurance Company, Patrons Oxford Insurance Company, Patriot Mutual Insurance Company, and State Farm Mutual Automobile Insurance Company;

- Industry-related Associations: American Insurance Association, Maine Association of Insurance Adjusters, Maine Insurance Agents Association, Maine Trial Lawyers Association, National Association of Mutual Insurance Companies; and Property Casualty Insurance Association.
- Committee Members: Senator Peter Mills; Representatives John R. Brautigam, R. Kenneth Lindell, and Donald E. Pilon.

After the July 18th meeting, the Bureau sent these questions to interested parties and asked them to submit written comments by August 26, 2005:

> What policy form language changes have insurers made or attempted to make since *Jack*[4] and *Butterfield* were decided in order to limit the ability of persons to make wrongful death claims under their own policy with respect to decedents not insured under that policy?
>
> For any time period for which information is available, the following statistical information:
>
> > How many highway/traffic fatalities in Maine have involved uninsured motorists as tortfeasors?
> >
> > With respect to those fatalities, how many involved a wrongful death claim brought by a personal representative against his or her own motor vehicle insurance policy?
> >
> > Of those, how many were brought by a personal representative with respect to a decedent not insured under the personal representative's policy?
> >
> > Of this last amount, how much was paid on each such claim?
>
> How do other states treat wrongful death claims under their uninsured motorist laws with respect to situations where the decedent is not an insured under the policy?
>
> How do insurers assess the risk(s) created by *Jack* and *Butterfield* and are they taking, or have they taken, any steps to change their premiums to reflect that risk?
>
> How many wrongful death claims, involving UM coverage, have been reopened or threatened to be reopened since *Butterfield* was decided? What information exists to

[4] This refers to *Jack v. Tracy*, 1999 ME 13. In *Jack*, the personal representative of the decedent, who was an unmarried minor living with the personal representative, brought a UM claim against, among others, the insurer of the decedent's father. On the personal representative's appeal from a denial of her motion for summary judgment against that insurer, the Law Court held that, consistent with the UM policy language, the decedent's father was an "insured" under the policy and was "legally entitled to recover damages" from the uninsured operator. He had this right because, although he was not the personal representative, the decedent left no surviving spouse or minor children. The father was an heir, with a cause of action for his child's wrongful death against the uninsured driver, and a statutory beneficiary of any amount recovered by the personal representative. The Law Court therefore allowed the personal representative to recover under the father's automobile insurance policy.

support the proposition that any such reopening has a potential negative effect on any person of such a magnitude as to suggest the desirability of a statutory change?

If your response to any question would change for underinsured motorist coverage as opposed to uninsured motorist coverage, please explain why.

The Bureau received written comments from insurers (Acadia, Maine Mutual, Patriot Mutual and Patrons Oxford) and from industry associations (American Insurance Association and Property Casualty Insurance Association). Copies of the comments received were distributed to all interested parties and may be summarized as follows:

Industry participants did not have information concerning the number of fatalities in Maine involving uninsured motorists as tortfeasors. There appear to be very few claims involving the wrongful death of someone not insured under the policy at issue. The insurers are concerned about the severity of wrongful death claims compared to other UM claims and the indefinite nature of their exposure under *Butterfield*. They are uncertain how to quantify that risk and therefore have not filed UM rate-change requests. No insurer identified any pre-*Butterfield* wrongful death claims that have been reopened or threatened to be reopened because of that decision. The insurers did not provide extensive information concerning how other states handle claims like *Butterfield*. An insurer submitted an article from the summer 2005 Gen Re publication "Driving Lessons" noting that *Gordon v. Atlanta Casualty Company*[5], a 2005 Georgia Supreme Court decision held in favor of the insured in a situation similar to *Butterfield*. Additionally, the same insurer noted that an Ohio case similarly interpreted an older UM statute, but that the Ohio legislature subsequently amended its UM statute to overturn that decision.

## Discussion

### A. Current Maine UM Law

The Maine UM statute has been in effect since 1970. Section 2902(1) requires that all motor vehicle liability insurance policies have coverage "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured, underinsured or hit-and-run motor vehicles, for bodily injury, sickness or disease, including death, resulting from the ownership, maintenance or use of such uninsured, underinsured or hit-and-run motor vehicle." UM coverage is in addition to primary coverage and protects policyholders against financial losses caused by drivers who do not have motor vehicle insurance. Motor vehicle insurance policies specifically define who is insured in their primary coverage. The standard definition generally includes the named insured, resident related family members, and any person using a covered vehicle. Not surprisingly, the standard definition of who is insured under a policy's UM coverage is parallel to the primary coverage definition of who is insured. UM coverage typically includes the named insured, resident related family members, and anyone else occupying the vehicle.

[5] 611 S.E.2d 24 (GA 2005)

The Maine Department of Public Safety ("Public Safety") does not have readily available information showing the rate at which uninsured drivers are responsible for fatal accidents. The table shows the number of motor vehicle accidents for the last five reported years according to Public Safety's 2004 Annual Report (http://www.maine.gov/dps/Docs/2004DPSANNRPT.pdf).

| Year | Total Number of Fatalities |
|---|---|
| 2000 | 169 |
| 2001 | 192 |
| 2002 | 216 |
| 2003 | 207 |
| 2004 | 194 |

According to a study conducted by the Insurance Research Council ("IRC") for the period of 1995 to 1997 (http://www.ircweb.org/news/2001-02-01.htm), four percent of Maine's drivers are uninsured.[6] The IRC calculates this rate by the ratio of claims made by individuals who were injured by uninsured drivers to claims made by individuals injured by insured drivers. Information from the insurer representatives suggests that UM claims involving fatalities might involve a higher percentage of uninsured motorists than do UM claims generally. The Bureau is unable to offer the Committee any definite conclusions as to how many UM wrongful death claims occur in Maine in any year.

### B. The *Butterfield* Decision

The Maine Law Court decided *Butterfield v. Norfolk & Dedham* on the following reported facts: Mr. Butterfield's daughter, Brandy, was a passenger in a car which collided with another vehicle.[7] Neither vehicle was insured. Brandy Butterfield was 21 years old and lived with her mother. She did not live with her father. UM claims filed against Brandy's insurer and against her mother's insurer were paid to the limits of each policy. The opinion does not show who filed these claims, to whom they were paid, or whether they went to suit.

Because Brandy did not live with her father and therefore was not an "insured person" under the primary coverage section of his motor vehicle insurance policy, Mr. Butterfield filed a claim against his insurer under the UM coverage. He argued that this coverage should apply because, as the representative of his daughter's estate, he was entitled to bring a claim against the other driver for her wrongful death. Under section 2902(1), he was a person, insured by his insurer, who was "legally entitled to recover damages" for his daughter's death. Mr. Butterfield's insurer denied the claim, as its policy limited recovery under the UM coverage to bodily injury "sustained by an insured person." The Law Court found that the insurer impermissibly applied this wording to deny the

[6] This is the nation's lowest rate of uninsured motorists.

[7] A more detailed description of the accident appears in the Law Court's decision on her driver's unsuccessful appeal to reverse his conviction for manslaughter. *State v. Joe-Pete Saucier*, 2001 ME 107. This decision indicates that only one vehicle was part of the accident, a detail that does not affect the result in *Butterfield*.

insured's claim and held that insurers may not limit UM coverage by adding restrictive language to their UM policies. The Court had previously held in *Jack v. Tracy*[8] that UM language that precisely tracked section 2902 did require an insurer to pay under its UM obligations on facts identical to those in *Butterfield*. The Court reasoned that it could not find otherwise in Mr. Butterfield's case, and decided that the insurer could not undo the language of section 2902.

The key to *Butterfield* is understanding the basis for the father's suit. Had Brandy survived the accident, she would have had a claim against the driver for the losses resulting from her injuries. Her father would have had no claim. Unfortunately she did die, and her father brought his claim under Maine's wrongful death statute.[9] This law preserves for the decedent's estate his or her claim against the tortfeasor. The statute says in part that the tortfeasor "shall be liable for damages" notwithstanding the death. The decedent's personal representative is the only person who may bring the claim. The wrongful death statute therefore creates a cause of action for the personal representative, who, to use the phrase from the UM statute, is "legally entitled to recover damages" from the tortfeasor.

Maine is not the only state whose courts have had to face the question whether or not insureds may recover under UM coverage with respect to injuries suffered by non-insureds. The parties' briefs to the Maine Supreme Judicial Court in *Butterfield* analyze many of those cases. The brief submitted on behalf of Norfolk & Dedham Mutual Insurance Company asserts that, "[b]ased upon Appellant's research to date, appellate courts in at least twelve jurisdictions have supported Appellant's contention that its policy limitations should be enforced despite the existence of an uninsured motorist statute devoid of such limiting language. (eg Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Louisiana, Mississippi, Missouri, New Mexico and Washington)". The brief also acknowledges four decisions in Iowa, Maryland, Nebraska and Ohio with contrary holdings. The brief submitted on behalf of Mr. Butterfield also cites those cases. His brief distinguishes the twelve cases relied on by the insurer, noting that, because seven of them were rendered by intermediate appellate courts and two were by federal courts interpreting state law, they do not represent the views of their respective highest state courts.

Norfolk & Dedham's reply brief also discussed Ohio's treatment of the UM issue. Norfolk & Dedham's attorney describes the Ohio decision, *Moore v. State Farm Auto Mutual Ins. Co.*,[10] as "a slim four to three majority opinion [that] appears seriously flawed as pointed out by the dissent [in that case,] since the Ohio legislature had amended its uninsured motorist statute to expressly over turn [sic]" the case relied upon by the majority of the court.

Through the NAIC, the Bureau asked other state insurance regulators for information as to how their laws would handle the *Butterfield* facts. Of the 19 regulators that responded, only two had laws which included a "sustained by the insured" limitation, and one

[8] See footnote 4 above.
[9] 18-A M.R.S.A. § 2-804
[10] 723 N.E.2d 97 (Ohio 2000)

indicated that its law requires coverage for wrongful death damages that a surviving relative is entitled to recover. Ten regulators did not answer the question whether their laws would allow insurers to write such a limitation into their policies. Of the remaining nine, seven indicated that either their statutory interpretation or case law would allow insurers to do so. Two regulators said that their states would not allow such limitations.

### C. Post-*Butterfield* Motor Vehicle Insurance Market Activity

The Bureau has received several form filings from insurers or advisory organizations attempting to comply with *Butterfield*. The Bureau has reviewed such filings in light of *Butterfield*'s holding that insurers may not put language in their UM coverage that is more restrictive than that allowed by section 2902(1). It has approved those filings that remove the "sustained by an insured" requirement from UM coverage. At least one filing has removed this requirement but simultaneously attempted to revise one of the definitions of insured to cover "anyone *who does not own an 'auto'* for damages he or she is entitled to recover because of 'bodily injury' sustained by another 'insured'." The theory advanced to support adding the italicized phrase is that persons who do own motor vehicles have UM coverage under their own policies and should go to them for recovery. The Bureau has disapproved these filings as being inconsistent with the Law Court cases that allow stacking of UM policies under certain circumstances.

The Bureau has not received any rate filings because of *Butterfield*. The responding insurers explained that they are uncertain how to quantify and underwrite the risks associated with this case. They believe that it is too early to know if the decision will lead to an increase in the number of *Butterfield*-type wrongful death claims. One insurer reports that it has received a claim filed by the adult son of a man who was killed when his abductors ran him over with his own car.

## Recommendations; Suggested Legislation

Discussions at the two meetings conducted by the Bureau ranged over a number of approaches to *Butterfield*, such as distinguishing claims on behalf of the heirs of a minor from those of an adult; basing recovery on the degree of affinity between the victim and the personal representative; using a named driver exclusion and eliminating retroactive claims; and distinguishing between commercial and private motor vehicle coverage. It became clear that these discussions would not result in consensus on recommendations or suggested legislation for the Committee to consider.

On one hand, the insurers have some concern that, while the number of UM fatality claims is relatively low, the payment amounts on those claims tends to be high. For example, one insurer reported that since 1987 it has had approximately 77 wrongful death claims, costing a total of $4,700,000, of which about 22 involved UM claims, costing $2,100,000. The UM claims therefore averaged about $94,500, and the remainder averaged about $47,300. Another insurer reported that since January 2000 it has incurred 2196 auto bodily injury claims, with an average loss of $6,400 and that, for the same period, 82 UM claims with an average loss of $33,000. Another insurer reported three

wrongful death claims against UM coverage in three years, with one closed without payment, one closed with payment of $293,300, and one still pending. The remaining insurer reported no *Butterfield*-type claims against its UM coverage; this does not answer the question whether it received other UM claims. The first two insurers' responses do not say whether their UM claims are similar to the *Butterfield* facts. The insurers also expressed concern with the difficulty in rating the *Butterfield* exposure, saying that they would need a family tree from each applicant in order to assess the likelihood that the applicant would file a UM claim as a personal representative. Finally, another insurer noted that commercial motor vehicle policies generally carry higher limits than do personal passenger vehicle policies, with correspondingly higher potential claims.

On the other hand, the Maine Trial Lawyers Association argued that insurers have been on notice of the potential for *Butterfield*-type claims at least since the Law Court decided *Jack* in 1999. The Trial Lawyers also pointed out that there is only one personal representative appointed to represent an estate and that distributions are not made to the representative but to the decedent's heirs. Further, they relied on the insurers' statement about lack of experience concerning new rates as evidence that the law does not merit revision. They also observed that the wrongful death statute limits non-pecuniary damages to $400,000 and punitive damages to $75,000.

## Conclusion

The wrongful death statute creates a claim to be brought through the personal representative of any person killed in a motor vehicle accident. The claim exists whether or not the tortfeasor has insurance. The UM statute protects all persons insured under motor vehicle liability policies who are "legally entitled to recover damages." This phrase encompasses the insured in his capacity as someone actually injured by an uninsured driver and in his capacity as the personal representative of someone killed by such a driver. The Law Court observed in *Wescott v. Allstate Insurance*[11] that this "statute is to be construed so as to assure a person injured by an uninsured motorist that he will be able to recover, from whatever source available, up to the total amount of his damages."

The Bureau's study did not identify a clear approach to recommend for consideration by the Committee. Nonetheless, the information received and discussions held may be helpful in informing the policy discussion and decision with which the Committee remains faced. While it was hoped that the interested parties could reach a consensus recommendation for the Committee, the issue of the interrelationship between the State's wrongful death statute and the UM statute is sufficiently complex to hinder any agreement.

The issue that remains for the Committee is whether it wants to preserve a personal representative's access to recovery under the personal representative's UM coverage under his or her own automobile policy. If the Committee does, no changes to the UM statute are necessary. If the Committee prefers to change the statute, perhaps the most straightforward approach is to amend the UM statute as proposed in LD 122, by inserting the limiting phrase "sustained by an insured person."

[11] 1979 ME 1

## TABLE OF APPENDICES

## Appendix A

24-A M.R.S.A. § 2902(1)

No policy insuring against liability arising out of the ownership, maintenance or use of any motor vehicle shall be delivered or issued for delivery in this State with respect to any such vehicle registered or principally garaged in this State, unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured, underinsured or hit-and-run motor vehicles, for bodily injury, sickness or disease, including death, resulting from the ownership, maintenance or use of such uninsured, underinsured or hit-and-run motor vehicle. The coverage herein required may be referred to as "uninsured vehicle coverage." For the purposes of this section, "underinsured motor vehicle" means a motor vehicle for which coverage is provided, but in amounts less than the minimum limits for bodily injury liability insurance provided for under the motorist's financial responsibility laws of this State or less than the limits of the injured party's uninsured vehicle coverage. [1975, c. 437, §1 (amd).]

## Appendix B

18-A M.R.S.A. § 2-804

(a) Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person or the corporation that would have been liable if death had not ensued shall be liable for damages as provided in this section, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as shall amount to a felony. [1979, c. 540, §1 (new).]

(b) Every such action must be brought by and in the name of the personal representative of the deceased person, and the amount recovered in every such action, except as otherwise provided, is for the exclusive benefit of the surviving spouse if no minor children, and of the children if no surviving spouse, and one-half for the exclusive benefit of the surviving spouse and one-half for the exclusive benefit of the minor children to be divided equally among them if there are both surviving spouse and minor children, and to the deceased's heirs to be distributed as provided in section 2-106 if there is neither surviving spouse nor minor children. The jury may give such damages as it determines a fair and just compensation with reference to the pecuniary injuries resulting from the death to the persons for whose benefit the action is brought and in addition shall give such damages as will compensate the estate of the deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses, and in addition may give damages not exceeding $400,000 for the loss of comfort, society and companionship of the deceased, including any damages for emotional distress arising from the same facts as those constituting the underlying claim, to the persons for whose benefit the action is brought, and in addition may give punitive damages not exceeding $75,000, provided that the action is commenced within 2 years after the decedent's death. If a claim under this section is settled without an action having been commenced, the amount paid in settlement must be distributed as provided in this subsection. No settlement on behalf of minor children is valid unless approved by the court, as provided in Title 14, section 1605. [1999, c. 772, §1 (amd).]

(c) Whenever death ensues following a period of conscious suffering, as a result of personal injuries due to the wrongful act, neglect or default of any person, the person who caused the personal injuries resulting in such conscious suffering and death shall, in addition to the action at common law and damages recoverable therein, be liable in damages in a separate count in the same action for such death, brought, commenced and determined and subject to the same limitation as to the amount recoverable for such death and exclusively for the beneficiaries in the manner set forth in subsection (b), separately found, but in such cases there shall be only one recovery for the same injury. [1979, c. 540, §1 (new).]

(d) Any action under this section brought against a governmental entity under Title 14, sections 8101 to 8118, shall be limited as provided in those sections. [1979, c. 540, §1 (new).]

**Appendix C**

LEXSEE 1999 ME 13

**LYNN JACK v. SCOTT TRACY et al.**

**Aro-98-390**

**SUPREME JUDICIAL COURT OF MAINE**

**1999 ME 13; 722 A.2d 869; 1999 Me. LEXIS 13**

**January 7, 1999, Argued**
**January 20, 1999, Decided**

**DISPOSITION:** [***1]

Judgment vacated and remanded for further proceedings consistent with this opinion.

**COUNSEL:** Attorney for plaintiff: Arthur J. Greif, Esq., (orally), Gilbert Law Offices, P.A., Bangor, ME.

Attorneys for Defendants: Thomas J. Pelletier, Esq., (orally), Solman & Hunter, P.A., Caribou, ME, (for Allstate Ins. Co.). John D. McElwee, esq., Caribou, ME, (for State Farm Ins. Co.). Allan Hanson, Esq., Caribou, ME (for Scott Tracy).

**JUDGES:** WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER, and CALKINS, JJ.

**OPINION:** [**870] DANA, J.

[*P1] The Superior Court (Aroostook County, Pierson, J.) reported this case to the Law Court pursuant to M.R. Civ. P. 72(c) after entering a judgment in favor of Allstate insurance Co. on Lynn Jack's partial motion for a summary judgment. Jack contends that pursuant to the terms of Allstate's automobile liability insurance policy the insured is entitled to recover uninsured motorist benefits for the death of the insured's uninsured daughter. We agree and vacate the judgment.

[*P2] In July 1996, Jessica Jack died while a passenger in a car operated by Scott Tracy, an uninsured motorist. Jessica was fifteen years old, unmarried, and had no children. [***2] Jessica's mother, Lynn Jack, was insured by an automobile liability insurance policy issued by State Farm Insurance Co., under which Jessica was insured. This policy included an uninsured motorist provision.

[*P3] Jessica's father, Jeremiah Leary, was married to and living with Rita Rogers. Rogers' Allstate automobile liability insurance policy provided for uninsured motorist coverage of $ 100,000 per person and $ 300,000 per accident.

[*P4] According to the Allstate uninsured motorist policy,

> [Allstate] will pay damages for bodily injury, sickness, disease or death which an insured person is legally entitled to recover from the owner or operator of an uninsured auto. Injury must be caused by accident and arise out of the ownership, maintenance or use of an uninsured auto.

Pursuant to the policy, one of the three classes of "Insured Persons" is, "You and any resident relative." "You" is defined as, "the policyholder named on the declarations page and that policyholder's resident spouse. "Resident" is defined as "the physical presence in your household with the intention to continue living there."

[*P5] Lynn Jack, as personal representative of the estate [***3] of Jessica Jack, sued Tracy, Allstate and State Farm. The complaint alleged that Tracy was liable for Jessica's wrongful death and conscious suffering, and that Allstate and State Farm were jointly and severally liable to the estate for the limits of the uninsured motorist policies issued to Lynn Jack and Rogers. -

[*P6] Jack moved for a partial summary judgment against Allstate, contending that Leary is entitled to recover uninsured motorist benefits pursuant to the Allstate policy for the death of Jessica, whether or not Jessica [**871] is an "insured person" as governed by the policy. The court denied the motion and, at the request of Jack, reported the issue to the Law Court pursuant to M.R. Civ. P. 72(c).

[*P7] A summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any . . . show that there is no genuine issue as to any material fact set forth in those statements and that any party is entitled to a judgment as a matter of law." M.R. Civ. P. 56(c). We review a summary judgment ruling for errors of law and view the evidence in the light most favorable to the non-moving party. Greenvall v. [***4] Maine Mutual Fire Ins. Co., 1998 ME 204, P5, 715 A.2d 949, 951.

UNINSURED MOTORIST POLICY

[*P8] The meaning of language in an insurance policy is a question of law. York Ins. Group of Maine v. Van Hall, 1997 ME 230, P8, 704 A.2d 366, 369. In reviewing the language of an insurance contract, "the function of the court is not to make a new contract for the parties by enlarging or diminishing its terms, but is to ascertain the meaning and intention of the contract actually made." Apgar v. Commercial Union Ins. Co., 683 A.2d 497, 500 (Me. 1996) (citations omitted). We construe standard insurance policies "most strongly" against the insurer, Gross v. Green Mountain Ins. Co., 506 A.2d 1139, 1141 (Me. 1986), and "interpret unambiguous language . . . according to its plain and commonly accepted meaning," Brackett v. Middlesex Ins. Co., 486 A.2d 1188, 1190 (Me. 1985).

[*P9] According to the plain language of the Allstate policy, to qualify for uninsured motorist benefits, one must be (1) "an insured person" who is (2) "legally entitled to recover from the owner or operator of an uninsured auto." Leary qualifies as "an insured person" pursuant to the Allstate policy, [***5] because he is the spouse and cohabitant of the policy holder. On appeal, Allstate does not contest this conclusion.

[*P10] Leary is also "legally entitled to recover from the . . . operator of an uninsured auto." Pursuant to the Maine wrongful death statute, Leary can recover from Tracy for the wrongful death of his daughter. See 18-A M.R.S.A. § 2-804(b) (1998). n1 The wrongful death statute states that, although the action "must be brought by . . . the personal representative of the deceased person, . . . the amount recovered in every such action . . . is for the exclusive benefit of . . . the deceased's heirs . . . if there is neither surviving spouse nor minor children." Id. (emphasis added). The statute "grants no rights to the deceased." Shaw v. Jendzejec, 1998 ME 208, P6, 717 A.2d 367, 369. Rather, it "provides a cause of action only to the living relatives or heirs of the deceased." Id. n2

n1 Title 18-A M.R.S.A. § 2-804 provides in part:

(a) Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person . . . that would have been liable if the death had not ensued shall be liable for damages as provided in this section...

(b) Every such action must be brought by and in the name of the personal representative of the deceased person, and the amount recovered in every such action, except as otherwise provided, is for the exclusive benefit of the surviving spouse if no minor children, and of the children if no surviving spouse, and one-half for the exclusive benefit of the surviving spouse and one-half for the exclusive benefit of the minor children to be divided equally among them if there are both surviving spouse and minor children, and to the deceased's heirs to be distributed as provided in section 2-106 if there is neither surviving spouse nor minor children....

n2 At oral argument, Allstate conceded that Leary was entitled to recover for the wrongful death of Jessica.

[***6]

[*P11] Because Jessica had neither a spouse nor children, Leary, as an heir, has a cause of action against Tracy for the wrongful death of Jessica, see id., and is a statutory beneficiary of any amount recovered by the personal representative, see 18-A M.R.S.A. § 2-804(b). Consequently, Leary "is legally entitled to recover from the . . . operator of an uninsured auto."

[*P12] Given that Leary is an insured person who is legally entitled to recover from an [**872] uninsured motorist, we conclude that pursuant to the plain language of the Allstate policy Leary is entitled to uninsured motorist benefits for the death of Jessica caused by Tracy. See Auto Club Ins. Ass'n v. DeLaGarza, 433 Mich. 208, 444 N.W.2d 803, 805-07 (Mich. 1989) (construing a similar policy and concluding that the insured was entitled to uninsured motorist benefits for the death of an uninsured relative for which the insured was legally entitled to recover from the uninsured motorist pursuant to the wrongful death statute). But see Allstate Ins. Co. v. Hammonds, 72 Wash. App. 664, 865 P.2d 560, 562 (Wash. Ct. App. 1994) (concluding that a similar policy did not provide coverage). Therefore, the court [***7] erred as a matter of law when it denied Jack's motion for a partial summary judgment against Allstate on the issue of policy coverage.

The entry is:

Judgment vacated and remanded for further proceedings consistent with this opinion.

**Appendix D**

LEXSEE 2004 ME 124

**GREGORY L. BUTTERFIELD v. NORFOLK & DEDHAM MUTUAL FIRE INSURANCE CO.**

**Docket: Cum-03-223**

**SUPREME JUDICIAL COURT OF MAINE**

**2004 ME 124; 860 A.2d 861; 2004 Me. LEXIS 143**

**October 14, 2003, Argued**
**September 30, 2004, Decided**

**PRIOR HISTORY:** BUTTERFIELD v. JOE PETE SAUCIER & NORFOLK & DEDHAM MUT. FIRE INS. CO., 2003 Me. Super. LEXIS 53 (Me. Super. Ct., Mar. 19, 2003)

**DISPOSITION:** [***1] Judgment affirmed.

**COUNSEL:** Attorney for plaintiffs: Thimi R. Mina, Esq. (orally) McCloskey, Mina & Cunniff, LLC, Portland, ME.

Attorney for defendant: Paul S. Douglass, Esq. (orally) Paul S. Douglass, P.A., Lewiston, ME.

**JUDGES:** Panel: SAUFLEY, C.J., and CLIFFORD, RUDMAN, DANA, ALEXANDER, CALKINS, and LEVY, JJ. Dissenting: CLIFFORD and ALEXANDER, JJ.

**OPINION:**

[**861] RUDMAN, J.

[*P1] Norfolk & Dedham Mutual Fire Insurance Co. appeals from a judgment entered in the Superior Court (Cumberland County, *Humphrey, J.*) in favor of Gregory L. Butterfield, on three counts of Butterfield's five-count complaint. Norfolk argues that the court erred by holding that provisions of the automobile insurance policy, issued by Norfolk, violate Maine's uninsured motorist statute, 24-A M.R.S.A. § 2902(1) (2000), impermissibly limiting [**862] Gregory's recovery to injury or damages sustained by persons named in the contract. We disagree and affirm the judgment.

[*P2] This case presents a narrow, yet important, question. Previously, we have held that when an uninsured motorist policy tracks the language in Maine's uninsured motorist statute, liability extends to cover not [***2] only named insureds, but any individual for whom a named insured is legally entitled to bring a claim for damages caused by an uninsured motorist. *Jack v. Tracy*, 1999 ME 13, 722 A.2d 869. The Superior Court addressed the question that necessarily follows: may an insurer use limiting language in an uninsured motorist policy, restricting its coverage to claims brought by named insureds, for injuries *sustained by* named insureds? We now hold that insurers may not limit uninsured motorist coverage by adding restrictive language to their uninsured motorist policies. n1

n1 Because we affirm the Superior Court's decision, we do not address Gregory's alternative argument that he is entitled to relief based on an independent claim for emotional distress pursuant to

the plain wording of his uninsured motorist policy.

I. BACKGROUND

[*P3] Gregory's twenty-one-year-old daughter, Brandy, died in an automobile accident. Both the vehicle in which Brandy was a passenger and the driver of the other vehicle [***3] were uninsured. Gregory is a named insured on an automobile insurance policy issued by Norfolk. He filed a claim with Norfolk for all damages he was legally entitled to recover due to the death of Brandy. Norfolk denied Gregory's claims, citing language in his policy that limited uninsured motorist recovery to injuries sustained by "insured persons," or family members within the policy's definition. The policy defines family members as persons related by blood, marriage, or adoption, who reside with the insured. Thus, because Brandy did not reside with Gregory, she was not a named insured under his policy. Gregory sought a declaratory judgment that Norfolk was liable.

II. DISCUSSION

[*P4] "We look first to the plain meaning of the statutory language as a means of effecting the legislative intent." *State v. Shepley*, 2003 ME 70, P 12, 822 A.2d 1147, 1151 (quoting *Pennings v. Pennings*, 2002 ME 3, P 13, 786 A.2d 622, 627) (internal quotation and citation omitted). "Unless the statute itself discloses a contrary intent, words in a statute must be given their plain, common, and ordinary meaning, such as [people of common intelligence would usually [***4] ascribe to them." *State v. Vainio*, 466 A.2d 471, 474 (Me. 1983). An insurance policy incorporates all the relevant mandatory provisions of the statute pursuant to which the policy was drafted. *Skidgell v. Universal Underwriters Ins. Co.*, 1997 ME 149, P 7, 697 A.2d 831, 833. The interpretation of section 2902(1) is a question of law, which we review de novo. *See State v. McLaughlin*, 2002 ME 55, P 5, 794 A.2d 69, 72.

[*P5] Maine law requires that any automobile insurance policy, insuring against liability, include coverage for "the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured, underinsured or hit-and-run motor vehicles, for bodily injury, sickness or disease, including death, resulting from the ownership, maintenance or use of such uninsured, underinsured or hit-and-run motor vehicle." 24-A M.R.S.A. § 2902(1). We have held that:

[**863] In contrast with the liberal construction to be given the remedial statute mandating uninsured motorist coverage in all liability insurance policies issued with respect to any vehicle registered or [***5] principally garaged in this state . . . courts, in order to carry out the primary purpose of such legislation, will construe conditions and exceptions of the insurance contract, inserted therein in an attempt to limit the coverage prescribed by the statute, strictly against the insurer and liberally in favor of the insured.

*Wescott v. Allstate Ins.*, 397 A.2d 156, 167 (Me. 1979).

[*P6] Norfolk's uninsured motorist policy does not precisely track Maine's uninsured motorist law. Under Maine's uninsured motorist statute, insurance policies issued in this State must include "protection of persons insured thereunder who are legally entitled to recover damages from . . . uninsured, underinsured or hit-and-run motor vehicles, for bodily injury." 24-A M.R.S.A. § 2902(1). Norfolk's policy deviates by limiting uninsured motorist coverage to damages an insured is legally entitled to recover because of bodily injury "sustained by an insured." Had Norfolk's policy tracked section 2902(1) without qualification, there is no question that Gregory would be able to recover for the death of Brandy, even though she was not a named insured under the policy. [***6] *See Jack*, 1999 ME 13, P 12, 722 A.2d at 871-72.

[*P7] Norfolk relies heavily on cases from other jurisdictions, asserting that the Superior Court's holding runs counter to a majority view. n2 In order to understand why Norfolk's phalanx of authority is ultimately unpersuasive, a closer look into the past and present of uninsured motorist jurisprudence is helpful.

n2 *Delancey v. State Farm Mut. Auto Ins. Co.*, 918 F.2d 491 (5th Cir. 1990); *State Farm Mut. Ins. Co. v. Wainscott*, 439 F. Supp. 840 (D. Alaska 1977); *Bartning v. State Farm Fire & Cas.*, 164 Ariz. 370, 793 P.2d 127 (Ariz. Ct. App 1990); *Smith v. Royal Ins. Co. of Am.*, 186 Cal. App. 3d 239, 230 Cal.Rptr. 495 (1986); *Farmers Ins. Exch. v. Chacon*, 939 P.2d 517 (Colo. Ct. App. 1997); *Valiant Ins. Co. v. Webster*, 567 So. 2d 408 (Fla. 1990); *State Farm Mut. Auto. Ins. v. George*, 326 Ill. App. 3d 1065, 762 N.E.2d 1163, 261 Ill. Dec. 236 (Ill. App. Ct. 2002); *Ivey v. Mass. Bay Ins. Co.*, 569 N.E.2d 692 (Ind. Ct. App. 1991); *Lafleur v. Fid. & Cas. Ins. Co. of New York*, 385 So. 2d 1241 (La. Ct. App. 1980); *Gillespie v. S. Farm Bureau Cas. Ins. Co.*, 343 So. 2d 467 (Miss. 1977); *Livingston v. Omaha Prop. & Cas. Ins. Co.*, 927 S.W.2d 444 (Mo. Ct. App. 1996); *Gamboa v. Allstate Ins. Co.*, 104 N.M. 756, 726 P.2d 1386 (N.M. 1986); *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 865 P.2d 560 (Wash. Ct. App. 1994).

[***7]

[*P8] Uninsured motorist coverage is a relatively recent development. "In 1955, certain auto insurance companies--in an evident effort to stave off the adoption by states of either compulsory insurance or unsatisfied judgment measures--began to offer uninsured motorist coverage in their own auto policies." n3 Due to increasing costs attributed to uninsured motorists, the majority of states currently require that insurers at least offer uninsured motorist coverage. n4

n3 Gary T. Schwartz, *Symposium: A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans*, 48 Ohio St. L.J. 419, 422 (1987).

n4 Mark Arthur Saltzman, *Reed v. Farmers Insurance Group*, 15 Ohio St. J. On Disp. Resol. 895 (2000) (discussing the proliferation of uninsured motorist laws).

[*P9] States adopting uninsured motorist legislation typically used similar or identical language, which insurers have often tracked in the policies they issue. The proliferation of similarly worded uninsured motorist statutes [***8] and policies have encouraged courts and litigants to attempt to distill a majority position. The results are [**864] often misleading, however, as the cases may address different issues, and often base their holdings on legal and policy precedents that are not universally accepted.

[*P10] It is necessary, at the outset, to distinguish between two distinct issues. The first and primary issue is whether coverage under a particular uninsured motorist statute and policy extends to cover situations where a named insured brings a claim (usually under a wrongful death theory) based on damages caused by an uninsured motorist when the victim is not named in the policy. The second issue (before us today) is whether, having found that a particular uninsured motorist statute does extend to such claims, may an insurer refuse to insure against these claims by inserting limiting language to its uninsured motorist insurance policies. The first issue is one of scope, whereas the second asks whether the recognized scope may be contractually curtailed. n5

n5 In other words, the issue becomes whether the scope of the uninsured motorist statute is permissive, or obligatory.

[***9]

[*P11] In most of the cases cited by Norfolk, courts are grappling with the first issue, involving scope. The resolution of this fundamental question usually turns on how the jurisdiction has historically approached the interpretation of insurance contracts and statutes. *See, e.g., Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 865 P.2d 560, 563-64 (Wash. Ct. App. 1994); *Gaddis v. Safeco Ins. Co*., 58 Wn. App. 537, 794 P.2d 533, 536-37 (Wash. Ct. App. 1990) (discussing that court's history of upholding insurance exclusions that bear a relationship to an increased risk born by an insurer); *Valiant Ins. Co. v. Webster*, 567 So. 2d 408, 410 (Fla. 1990) (stating that Florida courts have "consistently followed the principle that if the liability portions of an insurance policy would be applicable to a particular accident, the uninsured motorist provisions would likewise be applicable; whereas, if the liability provisions did not apply to a given accident, the uninsured motorist provisions [did not apply"). Thus, those courts relied upon their respective precedents and policy determinations in resolving the primary question of [***10] how far the Legislature intended uninsured motorist laws to reach.

[*P12] Any comparison with other jurisdictions must begin with the recognition that we have already interpreted Maine's uninsured motorist statute to extend coverage to wrongful death claims caused by an uninsured motorist, when the deceased was not an insured under the claimant's policy. n6 Of the cases cited by Norfolk, two appear to be irrelevant; n7 two come from jurisdictions that allow an insured to opt out of uninsured motorist coverage; n8 another two involve insurance policies that track the states' uninsured motorist law without limiting language (posing the precise [**865] question addressed by this court in *Jack*); n9 and three appear to be on point, involving similar statutes and policies, however containing decisions based on interpretations of the respective states' uninsured motorist statutes, which conflict with this Court's analysis in *Jack*. n10 Therefore, none of these cases are particularly helpful in interpreting Maine's uninsured motorist statute.

n6 Our holding in *Jack v. Tracy*, 1999 ME 13, 722 A.2d 869, thus, conflicts with settled law in jurisdictions such as Florida. "No Florida decision has allowed a survivor to recover under the wrongful death statute where the decedent could not have recovered." *Valiant Ins. Co*., 567 So. 2d at 411.

[***11]

n7 *Gamboa*, 726 P.2d at 1387-88 (the main issue before the court was whether stacking insurance policies is permitted); *Ivey*, 569 N.E.2d at 694-95 (plaintiff's claim was dismissed because he had failed to appoint a personal representative within the two-year time frame required by the statute).

n8 *Farmers Ins. Exch.*, 93f9 P.2d at 520; *LaFleur*, 385 So. 2d at 1244-45. The decision by these states to allow their citizens to opt out of uninsured motorist coverage suggests a different legislative intent, and makes any comparison with Maine's uninsured motorist law insignificant.

n9 *Bartning*, 793 P.2d at 128-29; *Auto Club Ins. Ass'n v. DeLaGarza*, 433 Mich. 208, 444 N.W.2d 803, 805 (Mich. 1989).

n10 *Smith*, 186 Cal. App. 3d at 242-43 (holding that the objective of California's uninsured motorist laws is the protection for injuries *sustained by an*

*insured*); *Livingston*, 927 S.W.2d at 446 (holding that the Legislature did not intend for survivors to pursue a wrongful death claim under their own uninsured motorist policy); *Delancey*, 918 F.2d at 495 (policyholders can *never* recover for injuries or death of a person not insured under the policy); *Gillespie*, 343 So. 2d at 470 (the subject of an uninsured motorist claim *must* be an insured to recover under a uninsured motorist policy). Each of these decisions is based on a narrower interpretation of the respective uninsured motorist law than that adopted by us.

[***12]

[*P13] The case before us is informed by a series of cases in which we have interpreted uninsured motorist insurance contracts. In *Jack* we were faced with facts identical to those involved in the present case: a father sought compensation under his uninsured motorist policy for the wrongful death of his daughter at the hands of an uninsured motorist. In *Jack*, we were called upon to interpret the meaning of an insurance contract containing language that tracked our uninsured motorist statute. n11 The policy in *Jack* stated that:

[Allstate will pay damages for bodily injury, sickness, disease or death which an insured person is legally entitled to recover from the owner or operator of an uninsured auto. Injury must be caused by accident and arise out of the ownership, maintenance or use of an uninsured auto.

*Jack*, 1999 ME 13, P 4, 722 A.2d at 870.

n11 Our uninsured motorist statute requires that insurers provide coverage "for the protection of persons insured thereunder *who are legally entitled to recover* damages from owners or operators of uninsured, underinsured or hit-and-run motor vehicles, for bodily injury, sickness or disease, including death, resulting from the ownership, maintenance or use of such uninsured, underinsured or hit-and-run motor vehicle." 24-A M.R.S.A. § 2902(1) (2000) (emphasis added).

[***13]

[14 Relying on the plain language cited above, we held that Allstate's policy required that it compensate its insured for the wrongful death of the insured's daughter. *See Jack*, 1999 ME 13, PP 9-12, 722 A.2d at 871-72. The operative words in the contract were those extending coverage for claims the insured was legally entitled to bring. We have recently reaffirmed this holding: "An insured heir with a claim against an uninsured tortfeasor . . . sufficiently states a claim recognized under Maine law." *Flaherty v. Allstate Ins. Co*., 2003 ME 72, P 22, 822 A.2d 1159, 1168 (citing *Jack*, 1999 ME 13, PP 9-12, 722 A.2d at 871-72).

[*P15] Possibly in response to this line of cases, insurers began adding limiting language in their insurance contracts. The policy language before us today states that Norfolk covers "damages . . . an insured is legally entitled to recover . . . because of bodily injury . . . *sustained by an insured"* (emphasis added). The policy still attempts to comply with the requirements in our uninsured motorist statute while simultaneously avoiding the result reached in *Jack* and *Flaherty* by requiring that [***14] the injured person be an insured. The question [**866] before us today, therefore, is whether insurers can avoid the result reached in *Jack* and *Flaherty* by adding limiting language to their uninsured motorist policies. Put another way: does Maine's uninsured motorist statute, 24-A M.R.S.A. § 2902, require that insurers provide uninsured motorist coverage in situations like those found in *Jack*, *Flaherty*, and the present case?

[*P16] This is a question of statutory interpretation. It is clear that liability does not

flow from Norfolk's policy, and we must now decide whether this is an impermissible limitation on uninsured motorist coverage pursuant to section 2902. We must pick up where we left off: in *Jack*, 1999 ME 13, P 10, 722 A.2d at 871, we recognized that an insured heir with a claim against an uninsured tortfeasor sufficiently states a claim recognized under Maine law, and that the coverage sought is a consequence of the plain language of uninsured motorist policies that (unlike Norfolk's) track our uninsured motorist statute. Can we now hold that this coverage, though recognized, is not a requirement of our uninsured [***15] motorist statute? Applying the analysis of our previous cases, we must answer in the negative.

[*P17] We have said that the following "plain language" commands the type of coverage sought by the plaintiff:

> [Allstate will pay damages for bodily injury, sickness, disease or death which an insured person is *legally entitled to recover* from the owner or operator of an uninsured auto. Injury must be caused by accident and arise out of the ownership, maintenance or use of an uninsured auto.

(Emphasis added.) *Jack*, 1999 ME 13, P 4, 722 A.2d at 870. Interpreting this policy, we concluded that its plain language required Allstate to provide precisely the type of coverage sought in the present case. The present case turns not on the interpretation of a contract but on the meaning of the words in the statute. If section 2902 requires that insurers provide the type of coverage excised by Norfolk's contract then the limitation cannot stand.

[*P18] We must interpret the uninsured motorist statute to determine whether insurers are required to provide the type of coverage that we determined flowed from Allstate's language cited above. Section 2902(1) provides: [***16]

> No policy insuring against liability arising out of the ownership, maintenance or use of any motor vehicle shall be delivered or issued for delivery in this State . . . unless coverage is provided . . . for the protection of persons insured thereunder *who are legally entitled to recover* damages from owners or operators of uninsured . . . motor vehicles.

24-A M.R.S.A. § 2902(1) (emphasis added). The operative language in both the contract in *Jack* and the uninsured motorist statute are the same. The statute requires that insurers (at a minimum) provide coverage for persons insured who are "legally entitled" to recover from an uninsured motorist; the Allstate policy interpreted in *Jack* extended coverage when an insured is "legally entitled" to recover from an uninsured motorist. Interpreting this "plain language," we concluded that coverage extended to insured persons who were legally entitled to bring a wrongful death claim as a result of the death of a person killed by an uninsured motorist.

[*P19] An analysis of the same language must yield the same result. Norfolk suggests that the coverage is permissible under the statute, but not [***17] required. This makes little sense as Maine's uninsured motorist statute outlines the bare requirements that an insurer *must* satisfy prior to issuing a policy in Maine. If section 2902 speaks to wrongful death claims of the [**867] type at issue here, then it does so in the context of requiring that insurers extend coverage to this situation.

[*P20] Uninsured motorist policies originally tracked the language in uninsured motorist statutes not because they wanted to adopt greater coverage than was required under the statute, but rather in an attempt to comply with the minimum requirements of the law. Unless we retreat from our interpretation of the policy language in *Jack*, we cannot now hold that the same words create a different result. The Legislature has set standards for minimal coverage. Insurers must meet that standard.

Norfolk's policy does not meet the requirements of section 2902.

The entry is:

Judgment affirmed.

**DISSENTBY:** CLIFFORD

**DISSENT:**

CLIFFORD, J., with whom ALEXANDER, J., joins, dissenting.

[*P21] Without the policy provision at issue in this case, Norfolk & Dedham could not accurately address the risk to which it is exposed in the uninsured motorist part of its [***18] policy, and on which it could base a reasonable premium. That provision limits the risks arising from injuries to a determinable number of persons, i.e. the named insureds under the policy and resident family members of the named insureds, and protects the insurer from risks that are unascertainable. In my view, the provision is reasonable, comports with our uninsured motorist statute, and is not contrary to our case law precedent. Accordingly, I respectfully dissent.

[*P22] Butterfield's uninsured motorist coverage with Norfolk & Dedham is limited to damages from injuries sustained by an insured. Brandy was not a resident of Butterfield's household and was not an insured under his Norfolk & Dedham policy. Brandy was a named insured under her own automobile policy, and the $ 50,000 uninsured motorist limits of that policy have already been paid. Moreover, Brandy was living with her mother at the time of her death, and was an insured under her mother's automobile liability policy. The $ 50,000 of uninsured motorist coverage under that policy has already been paid as well.

[*P23] The purpose of uninsured motorist coverage is "to provide recovery for injuries that might not [***19] otherwise be compensable because of financially irresponsible drivers." *Brackett v. Middlesex Ins. Co.*, 486 A.2d 1188, 1190 (Me. 1985). In *Wescott v. Allstate Ins.*, 397 A.2d 156 (Me. 1979), we said that the legislative intent of the statute is "to benefit all insured motorists by throwing the burden of compensating for injuries which would otherwise go without redress from the individual victim to the insurance industry for a premium." *Wescott*, 397 A.2d at 166. The uninsured motorist statute "affords to each owner of an automobile liability insurance policy a minimum standard of protection against the uninsured motorist." *Dufour v. Metro. Prop. & Liab. Ins. Co.*, 438 A.2d 1290, 1292 (Me. 1982). Uninsured motorist coverage exists not to increase the exposure of insurers to indeterminable risks, but to allow policyholders a minimum of coverage against uninsured motorists.

[*P24] We have previously upheld exclusions or language limiting the scope of policy coverage with regard to uninsured motorists even in the absence of similar statutory exclusions or limitations. *See Bourque v. Dairyland Ins. Co.*, 1999 ME 178, PP 8-10, 741 A.2d 50, 52-53 [***20] (upholding exclusion for "owner of a private passenger vehicle from the policy's definition of relative," and thus precluding recovery by the stepson of an insured under uninsured [**868] motorist coverage); *Brackett*, 486 A.2d at 1190-91 (upholding policy language excluding coverage for injuries sustained by an insured while on a motorcycle); *Lane v. Hartford Ins. Group*, 447 A.2d 818, 820 (Me. 1982) (upholding policy exclusion for "a farm type tractor or equipment designed for use principally off public roads" as not in contravention of public policy); *Dufour*, 438 A.2d at 1292-93 (upholding policy language limiting the maximum recovery to $ 50,000 per person). We concluded that these restrictions were not repugnant to the public policy expressed by our uninsured motorist statute, 24-A M.R.S.A. § 2902(1) (2000).

[*P25] Moreover, we have avoided interpreting the uninsured motorist statute so broadly as to subject insurers to unforeseen risks and consumers to higher costs. In *Levine v. State Farm Mut. Auto. Ins. Co.*, 2004 ME 33,

P 14, 843 A.2d 24, 29, for example, we rejected the insured's argument [***21] and allowed an insurer providing uninsured motorist coverage to offset its responsibility against the tortfeasor's policy amount, thus avoiding increases in the risks sustained by the insurance carrier and the cost of insurance for the consumer.

[*P26] The common sense provision in the Norfolk & Dedham policy at issue permits recovery only to named insureds under the policy or resident family members of the named insureds. Brandy qualifies as neither. This limitation allows the insurer to assess and calculate the risk, and to charge a reasonable premium to cover that risk. Restrictions similar to the one in Norfolk & Dedham's policy have been upheld in most states in which they have been challenged. In *Valiant Ins. Co. v. Webster*, 567 So. 2d 408 (Fla. 1990), a passenger died as a result of the negligence of an uninsured driver. *Id*. at 409. The passenger's father, as a survivor of his son's estate, filed a claim for damages under his own uninsured motorist policy. *Id*. The Florida Supreme Court held that the uninsured motorist statute "does not require coverage for anyone who may be entitled to recover consequential damages as a survivor under [***22] the wrongful death statute when the decedent himself had neither liability nor uninsured motorist coverage under the policy." *Id*. at 411. Like the passenger in *Valiant Insurance*, the decedent in this case did not have coverage under Norfolk & Dedham's policy.

[*P27] In *Gaddis v. Safeco Ins. Co. of Am.*, 58 Wn. App. 537, 794 P.2d 533 (Wash. Ct. App. 1990), the Washington Court of Appeals recognized that holding insurers liable for claims by insureds arising from the injuries or death of those not covered by the insurance policy exposed insurers to increased risks. *Id*. at 537. The court stated in denying the claims: "We do not perceive that such broad coverage of losses arising from death or injury to noninsured persons was expected or intended by the average reasonable purchaser of insurance." *Id*.

[*P28] Courts hold that provisions meant to shield insurers from unascertainable risks are reasonable and do not contravene public policy. For instance, the policy in *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 865 P.2d 560 (Wash. Ct. App. 1994), included a limitation identical to Norfolk & Dedham's [***23] restriction, which limited recovery to the named insured and the named insured's resident spouse and resident relatives. *Id*. at 560-61. The *Allstate Insurance* court noted that "'exclusions that have been held violative of public policy generally have been those manifesting no relation to any increased risk faced by the insurer, or when innocent victims have been denied coverage for no good reason. . . . Where the insurer faces an increased risk . . . exclusions have been upheld.'" *Allstate Ins. Co.*, 865 P.2d at 563-64 (quoting *Eurick* [**869] *v. Pemco Ins. Co*., 108 Wn.2d 338, 738 P.2d 251, 253-54 (Wash. 1987)). Like uninsured motorist coverage for motorcycles, uninsured motorist coverage for injuries to unknown third parties creates an increased risk to insurers. *Eurick*, 738 P.2d at 254; *see also Mut. of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 643 P.2d 441, 444 (Wash. 1982) (concluding that "an insurer is free to limit its risks by excluding coverage when the nature of its risk is altered by factors not contemplated by it in computing premiums").

[*P29] Other states have upheld similar provisions. In *Auto Club Ins. Ass'n v. DeLaGarza*, 433 Mich. 208, 444 N.W.2d 803 (Mich. 1989), [***24] the Supreme Court of Michigan held that "insurers may limit the risks they choose to assume and fix premiums accordingly," provided policy limitations are clearly expressed in the policy language. *Auto Club Ins. Ass'n*, 444 N.W.2d at 806. The limitation in this case is clearly set out in the language of Norfolk & Dedham's policy.

[*P30] In *Curtis v. Allstate Ins. Co.*, 473 F. Supp. 315 (E.D. La. 1979), *aff'd*, 631 F.2d

79 (5th Cir. 1980), the District Court for the Eastern District of Louisiana, in determining whether a territorial restriction found in a policy was contrary to public policy, observed that:

Insurers providing [uninsured motorist coverage must base their rates on the risk that the insured will be struck by an uninsured vehicle. It is certainly rational to exclude countries where the number of uninsured motorists is unknown or so high as to make coverage impractical. We do not find it was the legislature's intent to prohibit all general restrictions as applied to uninsured motorist coverage.

*Curtis*, 473 F. Supp. at 317. Without the provision limiting recovery to injuries sustained by an insured, [***25] the number of persons whose injuries are eligible for recovery under Norfolk & Dedham's policy is likewise unknown and makes the assessment of risk, and therefore the calculation of the cost of coverage, difficult to determine. *See id.*

[*P31] Contrary to the Court's conclusion, we have not decided that our uninsured motorist statute prohibits the provision at issue here. Such a policy limitation has never been before us, and was not before us in *Jack v. Tracy*, 1999 ME 13, 722 A.2d 869. In *Jack*, Jessica Jack was killed in an auto accident in which she was a passenger in an automobile operated by Scott Tracy. *Jack*, 1999 ME 13, P 2, 722 A.2d at 870. Jessica was fifteen years old and living with her mother. *Id.* Her father's wife, Rita Rogers, was the owner of an automobile policy issued by Allstate with broadly worded uninsured motorist language that provided:

[Allstate will pay damages for bodily injury, sickness, disease or death which an insured person is legally entitled to recover from the owner or operator of an uninsured auto. Injury must be caused by accident and arise out of the ownership, maintenance or use of an uninsured [***26] auto.

1999 ME 13 at PP 3-4, 722 A.2d at 870.

[*P32] Jessica's father, as the spouse of Rogers, was an insured person under the Allstate policy, and, as an heir of Jessica, he was legally entitled to recover from Tracy, the operator of the uninsured vehicle, for the wrongful death of his daughter. 1999 ME 13 at PP 9-10, 722 A.2d at 871; 18-A M.R.S.A. § 2-804 (1998 & Supp. 2003). The Allstate policy did not limit coverage to claims brought by named insureds for injuries sustained by named insureds, as does the policy in the present case. In *Jack*, we did not hold that recovery by the girl's father was *mandatory* under the uninsured motorist statute. Rather, the [**870] holding was that the statute did not *preclude* such recovery. Nor does our decision in *Flaherty v. Allstate Ins. Co.*, 2003 ME 72, 822 A.2d 1159, which involved a policy with the same uninsured motorist language as in *Jack*, prohibit the provision in Norfolk & Dedham's policy.

[*P33] Indeed, in support of our decision in *Jack*, we cited *Auto Club Ins. Ass'n. Jack*, 1999 ME 13 at P 12, 722 A.2d at 871-72. In *Auto Club Ins. Ass'n*, the Michigan Supreme [***27] Court stated that "if [the insurer intended to except wrongful death damages or *to limit coverage to bodily injury sustained only by an insured person*, it could have included limiting language in its policy of insurance." *Auto Club Ins. Ass'n*, 444 N.W.2d at 806 (emphasis added).

[*P34] The named insured limitation in its policy allows Norfolk & Dedham, as an insurer, to better ascertain its risk in calculating premiums to be paid for the coverage offered. The decision by the Court, when taken to its logical conclusion, means that an insurer offering uninsured motorist protection is prevented from restricting in *any* way the scope of coverage. In my view, the Legislature did not intend our uninsured motorist statute to prevent insurers from assessing risks and limiting uninsured motorist coverage to damages arising from injury to insureds. *See*

*State v. Hart*, 640 A.2d 740, 741 (Me. 1994) (citation omitted) ("The Legislature is presumed not to intend an absurd result . . . ."). Such a provision does not contravene the public policy behind uninsured motorist coverage in this State, and is reasonable. I would vacate the judgment.

**Appendix E**

**122st MAINE LEGISLATURE**

**First Regular Session**

---

**Legislative Document No. 122**

---

**H.P. 98**
**An Act To Allow Insurers To Limit Their Uninsured Motorist Coverage to Persons Listed on the Policy**

---

**Referred to the Committee on Insurance and Financial Services .**

**Presented by Representative FISCHER of Presque Isle.**
**Cosponsored by Senator MAYO of Sagadahoc and**
**Representative PERRY A of Calais.**

---

**Fiscal Impact: Not Yet Determined, Fiscal Note**

**Be it enacted by the People of the State of Maine as follows:**

**Sec. 1. 24-A MRSA §2902, sub-§1,** as amended by PL 1975, c. 437, §1, is further amended to read:

**1.** ~~No~~ A policy insuring against liability arising out of the ownership, maintenance or use of any motor vehicle ~~shall~~ may not be delivered or issued for delivery in this State with respect to any such vehicle registered or principally garaged in this State, unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured, underinsured or hit-and-run motor vehicles, for bodily injury, sickness or disease, including death, sustained by an insured person resulting from the ownership, maintenance or use of such uninsured, underinsured or hit-and-run motor vehicle. The coverage herein required may be referred to as "uninsured vehicle coverage." For the purposes of this section, "underinsured motor vehicle" means a motor vehicle for which coverage is provided, but in amounts less than the minimum limits for bodily injury liability insurance provided for under the motorist's financial responsibility laws of this State or less than the limits of the injured party's uninsured vehicle coverage.

## SUMMARY

This bill clarifies the Legislature's intent regarding the uninsured motorist statute in response to the recent Law Court decision in Butterfield v. Norfolk and Dedham Mutual Fire Insurance Company, 2004 ME 124, Maine Supreme Judicial Court, September 30, 2004. The bill clarifies that an insurance policy may limit uninsured motorist coverage to the recovery of damages by an insured person under the policy for bodily injury, sickness or disease, including death, sustained by that insured person.